

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

BRYAN COLBY CHAPPELL,)	
)	
Plaintiff,)	
)	
v.)	Cause No. 2:20-cv-00224-JRS-MG
)	
ELIZABETH TRUEBLOOD, <i>Dr., et al.</i> ,)	
)	
Defendants.)	

**BRIEF IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT ON FAILURE TO EXHAUST DEFENSE**

Plaintiff Bryan Colby Chappell (“Chappell”), an inmate confined within the Federal Bureau of Prisons (“BOP”), brings this action pursuant to *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971), against twenty-two defendants. The allegations in Chappell’s Second Amended Complaint span over three years, from September 2017 through January 2021, and involve a range of events during that period. [See generally Filing No. 48.] As construed by the Court [see Filing Nos. 34, 47], Chappell brings First Amendment retaliation claims, Eighth Amendment claims, or both against the twenty-two individual defendants.

But, as set forth below, Chappell’s First Amendment retaliation claims and Eighth Amendment “conspiracy” and “threat” claims present new *Bivens* contexts, and “special factors” counsel against expanding *Bivens* to those claims. See *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Accordingly, these claims must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Moreover, regarding the claims brought against nineteen of the defendants, Chappell’s allegations, even accepted as true, are either too vague and general, do not support a plausible

inference that certain defendants violated Chappell's rights under the Eighth Amendment, are barred by the statute of limitations, or a combination thereof. As such, Defendants Dr. Carmichael, PA Muscatell, PA Mata, Assistant Health Services Administrator ("AHSA") Klink/Julian (hereinafter, Julian), AHSA Booth, RN Worthington, Dr. Lukens, Dr. Trueblood, Officer Sconce, Officer Penman, Factory Manager Wright, Officer Atterbury, Officer Snow, Captain Hess, Counselor Hart, Unit Manager Royer, AW Hirons, Lt. Baker, and Warden Bell are entitled to complete dismissal as defendants in this action under Rule 12(b)(6).

Alternatively, leaving aside these 12(b)(6) deficiencies, all of Chappell's remaining, timely claims in this action must be dismissed for his failure to exhaust those claims before initiating this action in April of 2020. As explained below, although Chappell did fully exhaust five remedy cases, the allegations encompassed in those cases occurred outside the applicable statute of limitations. Thus, Chappell failed to exhaust any of the remaining, timely claims, necessitating dismissal of this entire action.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 27, 2020, Chappell initiated this action against numerous BOP employees, bringing a number of claims against them. [Filing No. 1.] In October, Chappell filed an Amended Complaint [Filing No. 31], and in January 2021, he moved to add Lt. Sherman and Officer Vest as defendants, accusing them of acting inappropriately during his transfer on January 6, 2021 [Filing No. 42]. After screening, the Court allowed various First Amendment retaliation claims, Eighth Amendment claims, or both to proceed forward against twenty-two defendants under a *Bivens* theory. [See Filing Nos. 34, 47.]

¹ Should the Court deny this motion, Defendants reserve the right to move for summary judgment on the merits of Chappell's claims, and any other defenses, at a later date.

II. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE²

A. Bryan Chappell

Chappell is a federal inmate who has been in BOP custody since September 7, 2012. [Filing No. 102-1 (Declaration of Renee Turner (“Turner Decl.”)) at ¶ 4.] Chappell is currently housed at the Federal Correctional Institution – Medium I in Butner, North Carolina. [*Id.* at ¶ 3; *see* Filing No. 102-2 (Turner Decl. Att. 1) at 1.] From approximately November 6, 2015, to January 6, 2021, Chappell was housed at the Federal Correctional Institution in Terre Haute (“FCI Terre Haute”), the medium security component of FCC Terre Haute. [Filing No. 102-1 (Turner Decl.) at ¶ 4; Filing No. 102-2 (Turner Decl. Att. 1) at 1-2.]

B. BOP’s Administrative Remedy System

The BOP has promulgated an administrative remedy system that is codified at 28 C.F.R. § 542.10, *et seq.*, and BOP Program Statement 1330.18, Administrative Remedy Program.³ [Filing No. 102-1 (Turner Decl.) at ¶ 5.] This administrative remedy system was in effect at FCC Terre Haute during the entire time that Chappell was housed there. [*Id.*]

All unrestricted BOP Program Statements are available for inmate access via their respective institution law library, including BOP Program Statement 1330.18, Administrative Remedy Program. [*Id.*] Additionally, administrative remedy filing procedures are outlined and explained to the inmates each time they arrive at a federal prison as part of the Admission and Orientation process. [*Id.*] Inmates are likewise instructed where to find BOP Policy, FCC Terre Haute Institution Supplements, and how to access the inmate Electronic Law Library. [*Id.*]

² Should the Court consider Defendants’ alternative motion for summary judgment on their failure to exhaust defense, this section is included pursuant to S.D Ind. L. R. 56-1(a).

³ A full copy of BOP Program Statement 1330.18 is publicly available at http://www.bop.gov/policy/progstat/1330_018.pdf.

Finally, inmates are informed that if they have an issue or question for staff, they can ask in person or submit an Inmate Request to Staff by hard copy or electronically to a staff resource mailbox. [*Id.*]

All administrative remedy requests submitted by inmates are logged and tracked in the SENTRY computer database, which is an electronic record keeping system utilized by the BOP. [*Id.* at ¶ 6.] Administrative remedy requests filed at the institution level are referred to as BP-9s, and are identified in the SENTRY database by the notation “F1” following the remedy identification number. [*Id.* at ¶ 8.] Regional Office filings are referred to as BP-10s, and are identified by the notation “R1” following the remedy identification number. [*Id.*] Central Office (or General Counsel) filings are referred to as BP-11s, and are identified by the notation “A1” following the remedy identification number. [*Id.*] If amended or successive filings are submitted at the same level, the numeral following the alphabetical letter will change accordingly. [*Id.*] Rejected submissions are not considered “filed” and copies are not required to be maintained by the agency unless the submission was deemed “sensitive.” [*Id.*]

C. Chappell’s Administrative Remedies

As of April 8, 2021, Chappell had submitted approximately 83 administrative remedies during his BOP incarceration. [Filing No. 102-1 (Turner Decl.) at ¶ 10; *see generally* Filing No. 102-4 (Turner Decl. Att. 3).] Chappell submitted approximately 63 of those remedies between September 2017 and May 2020. [*Id.*; *see generally* Filing No. 102-4 (Turner Decl. Att. 3) at 8-39.] As of February 11, 2021, Chappell exhausted only five remedy cases during his BOP incarceration—Nos. 921499, 921520, 924723, 926050, and 928471.⁴ [Filing No. 102-1 (Turner

⁴ Remedy Nos. 969256-A1 and 969258-A1, alleging “staff misconduct,” were rejected at the Central Office level. [Filing No. 102-1 (Turner Decl.) at ¶ 11; *see* Filing No. 102-5 (Turner Decl. Att. 4) at 2.] As such, the BOP did not retain copies of those submissions. [Filing No.

Decl.) at ¶ 11; *see generally* Filing No. 102-5 (Turner Decl. Att. 4).] All of these remedy cases were closed between April 3, 2018, and May 11, 2018. [Filing No. 102-1 (Turner Decl.) at ¶ 11; *see generally* Filing No. 102-5 (Turner Decl. Att. 4).] The remaining administrative remedies that Chappell submitted between September 2017 and May 2020 are in unexhausted remedy cases.⁵ [Filing No. 102-1 (Turner Decl.) at ¶¶ 17-36; *see* Filing Nos. 102-11 to 102-35.]

1. Remedy Case No. 921499

On November 14, 2017, Chappell filed Remedy No. 921499-F1 at the institutional level, alleging that he underwent an inappropriate catheterization procedure at Union Hospital on September 22, 2017. [See Filing No. 102-1 (Turner Decl.) at ¶ 12; Filing No. 102-6 (Turner Decl. Att. 5) at 1-5.] After Chappell received a response from the Warden, he filed a BP-10 with the Regional Director, who responded. [See Filing No. 102-1 (Turner Decl.) at ¶ 12; Filing No. 102-6 (Turner Decl. Att. 5) at 6-8.] Chappell then filed a BP-11 with the BOP's Central Office, which responded on April 12, 2018, closing the case. [See Filing No. 102-1 (Turner Decl.) at ¶ 12; Filing No. 102-6 (Turner Decl. Att. 5) at 9-10.]

2. Remedy Case No. 921520

Also on November 14, 2017, Chappell filed Remedy No. 921520-F1 at the institution, contending that he had not received appropriate cardiac care from Dr. Orman, Nurse Bixler, PA Mata, and RN Worthington, among others, between September 25, 2017, and September 29, 2017, in retaliation for reporting what had purportedly occurred at Union Hospital on September 22nd. [See Filing No. 102-1 (Turner Decl.) at ¶ 13; Filing No. 102-7 (Turner Decl. Att. 6) at 1-

102-1 (Turner Decl.) at ¶ 11.]

⁵ To the extent that the BOP maintained copies of these submissions, summaries of these unexhausted remedies are included in Ms. Turner's Declaration. In the interests of brevity, those summaries are not reproduced here.

4.] After receiving responses from the Warden to his BP-9 and the Regional Director to his BP-10, Chappell filed a BP-11 with the Central Office, which denied his appeal on April 3, 2018. [See Filing No. 102-1 (Turner Decl.) at ¶ 13; Filing No. 102-7 (Turner Decl. Att. 6) at 5-10.]

3. Remedy Case No. 924723

On December 13, 2017, Chappell submitted Remedy No. 924723-F1 to the institution, alleging he suffered a heart attack on November 19, 2017, and was refused an EKG by Nurses Norris and McGee. [See Filing No. 102-1 (Turner Decl.) at ¶ 14; Filing No. 102-8 (Turner Decl. Att. 7) at 1-4.] After receiving the necessary responses to his BP-9 and BP-10, Chappell filed a BP-11 with the Central Office, which denied his appeal on May 11, 2018. [See Filing No. 102-1 (Turner Decl.) at ¶ 14; Filing No. 102-8 (Turner Decl. Att. 7) at 5-9.]

4. Remedy Case No. 926050

On December 28, 2017, Chappell submitted Remedy No. 926050-F1 at the institutional level, alleging that Counselor Hart denied him remedies regarding the catheterization procedure on September 22nd, and that staff threatened him for trying to report this. [See Filing No. 102-1 (Turner Decl.) at ¶ 15; Filing No. 102-9 (Turner Decl. Att. 8) at 1-3.] After Warden Bell responded to Chappell's BP-9, Chappell appealed to the Regional Director, filing Remedy No. 926050-R1 on February 28, 2018. [See Filing No. 102-1 (Turner Decl.) at ¶ 15; Filing No. 102-4 (Turner Decl. Att. 3) at 14; Filing No. 102-9 (Turner Decl. Att. 8) at 4.] The remedy was rejected, but Chappell resubmitted it, and the Regional Office accepted the resubmission. [See Filing No. 102-1 (Turner Decl.) at ¶ 15; Filing No. 102-4 (Turner Decl. Att. 3) at 16; Filing No. 102-9 (Turner Decl. Att. 8) at 5.] After the Regional Director responded to the BP-10, Chappell filed a BP-11 with the Central Office, which responded on May 11, 2018, closing the case. [See Filing No. 102-1 (Turner Decl.) at ¶ 15; Filing No. 102-9 (Turner Decl. Att. 8) at 6-8.]

5. Remedy Case No. 928471

On January 23, 2018, Chappell submitted Remedy No. 928471-F1, alleging that, at the end of December 2017, PA Mata did not renew his pain medications in retaliation for filing on her. [See Filing No. 102-1 (Turner Decl.) at ¶ 16; Filing No. 102-10 (Turner Decl. Att. 9) at 1-4.] Warden Bell responded to this BP-9 on January 29, 2018. [See Filing No. 102-1 (Turner Decl.) at ¶ 16; Filing No. 102-10 (Turner Decl. Att. 9) at 5.] Chappell's first BP-10 was rejected, but he successfully resubmitted it to the Regional Office. [See Filing No. 102-1 (Turner Decl.) at ¶ 16; Filing No. 102-4 (Turner Decl. Att. 3) at 14, 16; Filing No. 102-10 (Turner Decl. Att. 9) at 4, 6.] Once the Regional Director responded, Chappell filed a BP-11 with the Central Office, which responded on April 26, 2018, closing the case. [See Filing No. 102-1 (Turner Decl.) at ¶ 16; Filing No. 102-10 (Turner Decl. Att. 9) at 7-9.]

III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Because Chappell's First Amendment retaliation and Eighth Amendment conspiracy and threat claims arise in new *Bivens* contexts, the Court must engage in a "special factors" analysis. In light of the special factors counseling against expanding *Bivens* to these claims, the Court should decline to so expand the *Bivens* remedy, justifying the dismissal of these claims under Rule 12(b)(6). Moreover, nineteen defendants should be dismissed because the allegations in the operative Complaint, even if accepted as true, do not satisfy the pleading requirements, are insufficient to state Eighth Amendment violations, or are barred by the statute of limitations.

A. Standard on a Rule 12(b)(6) motion.

To survive a motion to dismiss under Rule 12(b)(6), the complaint "must actually suggest that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the speculative level." *Arnett v. Webster*, 658 F.3d 742, 752 (7th Cir. 2011) (citation omitted). In

other words, a plaintiff's complaint must "provide the 'grounds' of her 'entitle[ment] to relief'" based upon more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Dismissal is proper "if the complaint fails to set forth 'enough facts to state a claim to relief that is plausible on its face.'" *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Twombly*, 550 U.S. at 570). In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts as true all of the well-pled facts alleged by the plaintiff and all reasonable inferences that can be drawn therefrom. *Barnes v. Briley*, 420 F.3d 673, 677 (7th Cir. 2005).

B. Chappell's retaliation, conspiracy, and threat claims must be dismissed pursuant to *Abbasi*.

First, the Court should dismiss Chappell's First Amendment retaliation claims and Eighth Amendment conspiracy and threat claims because *Bivens* does not provide a remedy for them. In *Bivens*, 403 U.S. at 390, 397, the Supreme Court created an implied cause of action under the Fourth Amendment for an unreasonable search and seizure when federal law enforcement entered and searched a plaintiff's home without a warrant and arrested him for narcotics violations. In the more than forty years since *Bivens*, the Supreme Court has created an implied damages remedy for constitutional tort claims in only two other cases: under the Fifth Amendment's due process clause for alleged gender discrimination arising from a Congressman's firing of his female assistant, *Davis v. Passman*, 442 U.S. 228, 248-49 (1979), and under the Eighth Amendment's cruel and unusual punishment clause for prison officials' purported failure to provide an inmate with adequate medical treatment, resulting in his death, *Carlson v. Green*, 446 U.S. 14, 19 (1980). "These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the [Supreme] Court has approved of an implied damages remedy under the Constitution itself." *Abbasi*, 137 S. Ct. at 1855.

Moreover, in the last three decades, the Supreme Court has repeatedly declined to create new implied damages remedies under *Bivens* in a number of contexts. *See Abbasi*, 137 S. Ct. at 1857 (collecting cases); *accord Hernandez v. Mesa*, 140 S. Ct. 735, 742-43 (2020). In *Abbasi*, 137 S. Ct. at 1857, the Supreme Court once again declined to extend *Bivens* to a new category of constitutional claims, emphasizing that expanding the *Bivens* remedy is now a “disfavored” judicial activity.

After *Abbasi*, determining whether a *Bivens* remedy is available essentially amounts to a two-step inquiry. *Hernandez*, 140 S. Ct. at 743. First, the court must determine whether the claim arises in a new *Bivens* context. *Id.*; *Abbasi*, 137 S. Ct. at 1864. If so, the second step asks whether there are “special factors counseling hesitation before authorizing a new kind of federal litigation.” *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (citation omitted); *accord Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1857. Furthermore, “when alternative methods or relief are available, a *Bivens* remedy usually is not.” *Abbasi*, 137 S. Ct. at 1863 (citations omitted).

Courts should conduct this inquiry at the earliest possible stage. *Pereira Luna v. Thomas*, No. 2:19-cv-00431-JFW (AFM), 2020 WL 473133, at *6 (C.D. Cal. Jan. 28, 2020); *see Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017); *see also Early v. Shepherd*, No. 2:16-cv-00085-JMS-MJD, 2018 WL 4539230, at *13 (S.D. Ind. Sept. 21, 2018) (recognizing that “[p]ost-*Abbasi*, additional scrutiny is required before a plaintiff may proceed with a *Bivens* action if the claims arise “in a new *Bivens* context”). And in evaluating whether to extend the *Bivens* remedy, “the most important question is who should decide whether to provide for a damages remedy, Congress or the courts. The correct answer most often will be Congress.” *Hernandez*, 140 S. Ct. at 750 (internal quotation marks and citations omitted).

Applying this inquiry, the Court should decline to extend *Bivens* to Chappell’s First Amendment retaliation claims and Eighth Amendment conspiracy and threat claims.

1. Chappell’s First Amendment retaliation and Eighth Amendment conspiracy and threat claims present new *Bivens* contexts.

The first question a court must ask in determining whether a *Bivens* remedy is available is whether the claim arises in a new *Bivens* context—in other words, whether “the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court].” *Abbasi*, 137 S. Ct. at 1859, 1864. “[D]ifferences that are meaningful enough to make a given context a new one” may include, but are not limited to, “the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.” *Id.* at 1860.

As to Chappell’s First Amendment retaliation claims, the Supreme Court has *never* recognized a *Bivens* remedy for First Amendment claims. *See Wood v. Moss*, 572 U.S. 744, 757 (2014) (acknowledging that the Supreme Court has never recognized an implied damages remedy under the First Amendment); *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012) (noting that the Supreme Court has “never held that *Bivens* extends to First Amendment claims”); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (assuming, without deciding, that a free exercise claim was actionable because the issue was not raised on appeal and noting that the reluctance to extend *Bivens* liability “might well have disposed of respondent’s First Amendment claim of religious discrimination”); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (affirmatively declining to extend *Bivens* to a First Amendment claim); *Sebolt v. Samuels*, 749 F. App’x 458, 459 (7th Cir.

2018) (unpublished) (recognizing that the Supreme Court has not yet declared violations of the First Amendment actionable under *Bivens*). Furthermore, Chappell's retaliation claims bear no resemblance to the warrantless arrest in *Bivens*, the gender discrimination in *Davis*, or the denial of medical treatment in *Carson*, the only three contexts in which the Supreme Court has recognized a *Bivens* remedy. *See Abbasi*, 137 S. Ct. at 1860.

To the extent Chappell may try to frame his retaliation claims, or any other claims, as alleging "conspiracy claims" under the Eighth Amendment, those claims also present a new *Bivens* context. *See Fulks v. Watson*, No. 2:19-cv-00501-JPH-MJD, 2021 WL 1225922, at *5 (S.D. Ind. Mar. 31, 2021) (finding that plaintiff's conspiracy claim presented a new *Bivens* context); *Robinson v. Sauls*, ___ F. Supp. 3d ___, 2021 WL 716733, at *15 (N.D. Ga. Feb. 24, 2021) (noting that, although it need not reach the question of whether a *Bivens* conspiracy claim is cognizable, the court would find, post-*Abbasi*, that no such claim exists), *appeal filed*; *Brunson v. Nichols*, No. 1:14-CV-2467, 2018 WL 7286410, at *3 (W.D. La. Dec. 7, 2018), *report & recommendation adopted by* 2019 WL 545479 (W.D. La. Feb. 11, 2019) (finding that prisoner's retaliation and conspiracy claims related to his filing of a grievance and subsequent disciplinary write-up presented a new *Bivens* context).

The same is true of any claims that defendants violated the Eighth Amendment by merely verbally threatening Chappell.⁶ *See Dudley v. United States*, No. 4:19-cv-317-O, 2020 WL 532338, at *5-8 (N.D. Tex. Feb. 3, 2020) (concluding that Eighth Amendment claims arising from failure to protect inmate from verbal and psychological abuse, threats, and harassment from fellow officers and inmates after disclosing an alleged sexual assault present a new *Bivens*

⁶ This includes the Eighth Amendment claims against Wright, Atterbury, Hess, Royer, Baker, Penman, Bell, Hirons, and Snow.

context); *Winstead v. Matevousian*, No. 1:17-cv-00951-LJO-BAM (PC), 2018 WL 2021040, at *3 (E.D. Cal. Apr. 30, 2018) (allegations that defendants took plaintiff's mattress, threatened him, and labeled him a snitch in front of other inmates presented new *Bivens* context). That these claims are based on the same amendment as the claims in *Carlson* is not determinative. *See Hernandez*, 140 S. Ct. at 743 (“A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.”).

Unlike the plaintiff in *Carlson*, who alleged deliberate indifference to an asthmatic attack resulting in death, Chappell alleges that several defendants threatened to put him in the SHU, fire him from his orderly job, beat him, and give him “what [he] deserved,” among other verbal threats, but Chappell does not contend these threats ever materialized. Thus, these claims, which did not result in any physical injury let alone death as in *Carlson*, vary significantly from the Eighth Amendment claims in *Carlson* and present new *Bivens* contexts. As such, the Court must conduct a “special factors” analysis before allowing these claims to proceed forward. *See Abbasi*, 137 S. Ct. at 1859-60, 1864.

2. There are alternative, existing processes precluding expansion of *Bivens*.

In determining whether to expand the *Bivens* remedy, courts must consider “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Wilkie*, 551 U.S. at 550. “Where Congress has established an alternative remedial structure to protect a constitutional right, the Supreme Court has strongly cautioned that the courts should not create a second remedy.” *Goree v. Serio*, 735 F. App’x 894, 895 (7th Cir. 2018) (unpublished); *see Abbasi*, 137 S. Ct. at 1865 (noting where an alternative process exists, it “usually precludes a

court from authorizing a *Bivens* action”). Here, alternative processes and relief exist that should preclude extending *Bivens* to Chappell’s retaliation, conspiracy, and threat claims.

First, the BOP’s administrative remedy procedure is an alternative process that counsels against an expansion of *Bivens* to the case at hand. *See* 28 C.F.R. §§ 542.10-542.19. This program “provides yet another means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). Regardless of whether Chappell invoked or received relief from this process, that this alternative remedial structure is present counsels against inferring a *Bivens* cause of action in this new context. *See, e.g., Abbasi*, 137 S. Ct. at 1863 (noting that when alternative methods of relief are available a *Bivens* remedy usually is not); *Malesko*, 534 U.S. at 72-74 (considering, in declining to extend *Bivens* to respondent’s claims, that it was not “a situation in which claimants in respondent’s shoes lack effective remedies”).

Moreover, the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b), in aggregate with other remedies, may provide another means through which inmates can bring claims regarding purported retaliation or their conditions of confinement. While decades ago, the Supreme Court rejected the argument that the availability of an FTCA claim, standing alone, precluded a *Bivens* action, *Carlson*, 446 U.S. at 19, the Supreme Court’s views have significantly evolved in the interim. *See Abbasi*, 137 S. Ct. at 1856 (“[I]n light of the changes to the Court’s general approach to recognizing implied damages remedies, it is possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today.”). It is now clear that state law remedies, aggregated with other alternative remedies, can also be probative to the special factors analysis. *See, e.g., Minneci v. Pollard*, 565 U.S. 118, 120 (2012) (declining to recognize a *Bivens* remedy in part where “state tort law authorizes adequate alternative damages

actions”); *see also* *Badley v. Granger*, No. 2:17-cv-00041-JMS-DLP, 2018 WL 3022653, at *3 (S.D. Ind. June 18, 2018) (refusing to create *Bivens* remedy partly because the inmate could have pursued a FTCA claim).

The bottom line is that Chappell has other avenues of relief at his disposal, ones that do not require the expansion of the *Bivens* remedy beyond what the Supreme Court has permitted. Defendants need not divine of all conceivable alternative avenues that Chappell may have available to raise his claims. *See Liff v. Office of Inspector Gen. for U.S. Dep’t of Labor*, 881 F.3d 912, 921 (D.C. Cir. 2018) (declining to imply disfavored *Bivens* remedy and noting courts need “not parse the specific applicability of th[e] web of . . . remedies” to a plaintiff’s circumstances). Accordingly, because multiple processes and judicial remedies already exist to vindicate Chappell’s alleged infringement, the Court should not create a *Bivens* remedy here.

3. Other special factors further counsel against a *Bivens* remedy for retaliation, conspiracy, and threat claims.

Furthermore, other special factors counsel against expanding *Bivens* to Chappell’s retaliation, conspiracy, and threat claims. One such factor is that Congress has been very active in the area of prisoners’ rights, passing several legislative acts, including the Civil Rights of Institutionalized Persons Act (“CRIPA”) in 1980, and the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e, in 1995. The PLRA, which was passed fifteen years after the Supreme Court decided *Carlson*, was explicitly intended to limit prison litigation that was overburdening the legal system. *See, e.g., Porter v. Nussle*, 534 U.S. 516, 524-25 (2002) (“Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits[.]”); 141 Cong. Rec. S7526 (Daily Ed. May 25, 1995) (statement of Senator Kyl) (“Statistics . . . show that inmate suits are clogging the courts and draining precious judicial resources.”). Significantly, the PLRA did not provide for a standalone damages remedy against

individuals, suggesting that “Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.” *Abbasi*, 137 S. Ct. at 1865. The fact that Congress could have created a damages remedy against individuals and declined to do so weighs heavily against the expansion of *Bivens* to these claims. *See Abbasi*, 137 S. Ct. at 1865 (“[L]egislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation.”); *see also Oden v. True*, No. 3:18-cv-600-GCS, 2020 WL 4049922, at *6 (S.D. Ill. July 20, 2020) (noting that, in passing prisoner legislation such as the CRIPA, PLRA, and PREA, “Congress had ample opportunity to consider the kinds of remedies appropriate to readdress wrongs committed in prison” and did not authorize damage remedies in any of these acts); *Badley*, 2018 WL 3022653, at *4 (“Congress has been active in the area of prisoners’ rights, and its actions—not creating new rights—do not support the creation of a new *Bivens* claim.”).

Additionally, in *Abbasi*, 137 S. Ct. at 1856, the Court identified a “number of economic and governmental concerns” that courts must consider before recognizing an implied cause of action. These include the substantial defense costs often created by claims against federal officials; Congress’ “substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government;” and “the time and administrative costs attendant upon intrusions resulting from the discovery and trial process.” *Id.* Thus, the determination of whether to recognize a damages remedy “requires an assessment of its impact on governmental operations systemwide,” one that considers “the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and

implementation of public policies.” *Id.* at 1858. In the context of prisoners’ claims, the Supreme Court has further recognized the need to grant prison administrators “wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (internal quotation marks and citation omitted).

Expanding the *Bivens* remedy to Chappell’s retaliation, conspiracy, and threat claims would implicate, at the very least, the BOP’s policies on investigating and responding to allegations of staff misconduct, determining where to house inmates, and prison employment. Delving into such matters raises the risk (in a way that recognizing the medical claims in *Carlson* did not) of establishing the federal courts as “virtually continuing monitors of the wisdom and soundness of” BOP policies in these areas. *Cf. Laird v. Tatum*, 408 U.S. 1, 15 (1972). And, if faced with the prospect of personal liability under *Bivens*, BOP employees tasked with these duties would have to worry that inmates unsatisfied or angry about these important responsibilities would later seek personal judgments against them, a factor considered in *Abbasi*, 137 S. Ct. at 1863.

Regarding First Amendment retaliation claims specifically, such claims “brought by inmates should be approached with skepticism and particular care because such claims are easy to allege and difficult to prove,” which could “open the floodgates to litigation” that “clog the courts and burden individual prison officials with the costs and resources needed to defend such suits.” *Mack v. Yost*, 968 F.3d 311, 324, 325 (3d Cir. 2020) (internal quotation marks and citations omitted); *see also Earle v. Shreves*, 990 F.3d 774, 780-81 (4th Cir. 2021) (“Given the ease with which an inmate could manufacture a claim of retaliatory detention, allowing a *Bivens* action for such claims could lead to an intolerable level of judicial intrusion into an issue best left

to correctional experts.”); *Fulks*, 2021 WL 1225922, at *6 (finding “persuasive” the reasoning of the Third and Fourth Circuit in declining to extend *Bivens* to First Amendment retaliation claims). Moreover, there has been “a strong trend in district courts, post-*Abbasi*, holding that a *Bivens* retaliation claim under the First Amendment should not be recognized,” *Bistrian v. Levi*, 912 F.3d 79, 96 (3d Cir. 2018),⁷ a trend that has been present in this Court as well.⁸

Accordingly, the Court should again follow its own lead.

This Court has also recently declined to extend the *Bivens* remedy to an inmate’s claim that defendants conspired to thwart the investigation of his alleged sexual assault by intimidating him with cell searches, confiscating evidence, threatening him, and failing to conduct a proper investigation. *Fulks*, 2021 WL 1225922, at *6. Other courts have reached the same conclusion as to similar claims, including verbal threats and harassment. *See Smith v. Kendryna*, No. 2:20-cv-2417 KJN P, 2021 WL 1425273, at *2-3 (E.D. Cal. Apr. 15, 2021) (declining to extend *Bivens* to inmate’s sexual harassment claims); *Dudley*, 2020 WL 532338, at *5-8 (declining to

⁷ *See, e.g., Buenrostro v. Fajardo*, 770 F. App’x 807, 808 (9th Cir. 2019) (unpublished); *Vanderklok v. United States*, 868 F.3d 189, 208 (3d Cir. 2017); *Robinson v. Morris*, No. 18-cv-164-JPG, 2019 WL 7047231, at *2-3 (S.D. Ill. Dec. 23, 2019); *Silva v. Ward*, No. 16-cv-185-wmc, 2019 WL 4721052, at *4-6 (W.D. Wis. Sept. 26, 2019); *Allah v. Beasley*, No. 3:18-CV-2047, 2019 WL 4511693, at *6-7 (M.D. Pa. Sept. 19, 2019); *Ruffin v. Rawls*, No. 5:18-cv-591-OC-39PRL, 2019 WL 3752812, at *5-6 (M.D. Fla. Aug. 8, 2019); *Alexander v. Ortiz*, No. 15-6981 (JBS-AMD), 2018 WL 1399302, at *4-8 (D.N.J. Mar. 20, 2018); *Free v. Peikar*, No. 1:17-cv-00159 MJS (PC), 2018 WL 905388, at *5-6 (E.D. Cal. Feb. 15, 2018); *Jones v. Hernandez*, No. 16-cv-1986 W (WVG), 2017 WL 5194636, at *12 (S.D. Cal. Nov. 9, 2017); *Attkisson v. Holder*, No. 1:17-cv-364 (LMB/JFA), 2017 WL 5013230, at *5-8 (E.D. Va. Nov. 1, 2017); *Newman v. United States*, No. C 16-06477 WHA, 2017 WL 4642012, at *3 (N.D. Cal. Oct. 16, 2017).

⁸ *See, e.g., Fulks*, 2021 WL 1229522, at *4-7; *Kadamovas v. Siereveld*, No. 2:18-cv-00490-JRS-MJD, 2019 WL 2869674, at *1-2 (S.D. Ind. July 3, 2019); *Early*, 2018 WL 4539230, at *13-16; *Harris v. Dunbar*, No. 2:17-cv-00536-WTL-DLP, 2018 WL 3574736, at *2-4 (S.D. Ind. July 25, 2018); *Badley*, 2018 WL 3022653, at *2-4; *Albrechtsen v. Parsons*, No. 1:17-cv-01665-JMS-TAB, 2018 WL 2100361, at *3-5 (S.D. Ind. May 7, 2018); *Muhammad v. Gehrke*, No. 2:15-cv-00334-WTL-MJD, 2018 WL 1334936, at *3-4 (S.D. Ind. Mar. 15, 2018).

extend *Bivens* to Eighth Amendment claims arising from failure to protect inmate from verbal and psychological abuse, threats, and harassment from fellow officers and inmates after disclosing an alleged sexual assault); *Winstead*, 2018 WL 2021040, at *3 (declining to extend *Bivens* to claims that officers took plaintiff's mattress, threatened him, and labeled him a snitch in front of other inmates). Accordingly, the Court should decline to extend *Bivens* to Chappell's Eighth Amendment conspiracy and threat claims as well.

C. Chappell's Second Amended Complaint does not contain sufficient allegations against several defendants to state a constitutional violation.

Several defendants are further entitled to dismissal because Chappell's allegations are either too vague and general to satisfy the pleading requirements or do not state a violation of the Eighth Amendment.⁹ Although Federal Rule of Civil Procedure 8 "does not require 'detailed factual allegations,' [] it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. 544). Thus, a pleading that merely contains labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement is insufficient. *Id.*

Furthermore, a complaint must contain sufficient factual matter that, if accepted as true, states "a claim to relief that is plausible on its face." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard, while not a probability requirement, "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Therefore, "[w]here a complaint pleads facts that are merely consistent with a defendant's

⁹ Because all of the First Amendment retaliation claims should be dismissed after a "special factors" analysis, this section focuses on whether Chappell's allegations state cognizable Eighth Amendment claims.

liability, it stops short of the line between possibility and probability of entitlement to relief.” *Id.* (internal quotation marks and citation omitted).

Based on these pleading standards, Chappell’s allegations in Claim Nine are insufficient to state a claim against any of the defendants named within. In that claim, Chappell accuses Dr. Trueblood, Warden Bell, PA Mata, and PA Muscatell of lying to him for over two years about nodules spreading through his lungs and a mass. [Filing No. 48 at 11.] But he offers no factual enhancements about what Mata and Muscatell specifically did (or did not do) in relation to these nodules. This is significant because a plaintiff must provide sufficient facts to put each individual defendant on “notice about what exactly they might have done to violate [Plaintiff’s] rights.” *Abu-Shawish v. United States*, 546 F. App’x 576, 579 (7th Cir. 2013) (unpublished) (affirming dismissal for failure to state a claim where “the allegations do not suggest how the individual defendants violated [the plaintiff’s] constitutional rights and refer generally only to ‘defendants’ . . . without tying specific defendants to allegations of unconstitutional conduct.”). Moreover, in a *Bivens* action, a defendant can be liable only for the actions or omissions in which he *personally* participated. *Colbert v. City of Chicago*, 851 F.3d 649, 657 (7th Cir. 2017); *Sanville v. McCaughtry*, 266 F.3d 724, 734 (7th Cir. 2001).

The only details Chappell provides about Warden Bell and Dr. Trueblood are that after Dr. Doltz (purportedly) told him the nodules never spread and there was no mass, Warden Bell said he needed to trust Dr. Trueblood “real menacing like,” and Dr. Trueblood stated, “[M]aybe Dr. Doltz didn’t know what to look for, let’s focus on your heart the nodules are there and showed me it said a mass too.” [Filing No. 48 at 11.] But conditions of confinement constitute cruel and unusual punishment only if they are “so harsh as to shock the general conscience,” *Bono v. Saxbe*, 620 F.2d 609, 613 (7th Cir. 1980), or result in an “unquestioned and serious

deprivation of basic human needs,” *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). Warden Bell purportedly telling Chappell to trust Dr. Trueblood in a “menacing” way does not rise to the level of a constitutional violation. Nor does any alleged disagreement between Dr. Trueblood and Dr. Doltz regarding Chappell’s condition. *Snipes v. DeTella*, 95 F.3d 586, 591 (7th Cir. 1996) (reiterating that a mere disagreement with the course of an inmate’s medical treatment does not constitute an Eighth Amendment claim of deliberate indifference).

Claim Ten fares no better. In that claim, Chappell merely alleges that Dr. Carmichael, Dr. Trueblood, Mata, Warden Bell, Baker, Hart, and Julian knew about the September 22, 2017, catheterization procedure and that he requested help from them, but they threatened him and denied him treatment. [Filing No. 48 at 12.] Chappell, however, offers no factual enhancement supporting these conclusory allegations, such as specifically when each interaction occurred with each particular defendant, when he requested help from each defendant, how each defendant threatened him, or what treatment each defendant denied him and when. Such allegations are necessary to provide each defendant sufficient notice of “what exactly they might have done to violate [Chappell’s] rights.” *Abu-Shawish*, 546 F. App’x at 579.

By failing to support his general allegations in Claims Nine and Ten with any factual enhancements, Chappell fails to include facts that, even accepted as true, would allow any reasonable inference that the particular defendants named in these claims violated the Constitution or are liable for any alleged misconduct. *See Iqbal*, 556 U.S. at 678. These general allegations offer only a sheer possibility that these defendants acted unlawful, which is not enough. *See id.* Because these are the *only* allegations against Dr. Carmichael and Muscatell, they are entitled to dismissal as defendants.

As to AHSA Julian, the only other allegation against her is in Claim Eleven, in which

Chappell alleges that on February 11, 2020, PA Volstrof refused to examine or treat him and that, days later, AHSA Julian called him to the infirmary about filing on these events and told him to sign off on the BP-8s and when he refused, told him to get out “real hateful.” [Filing No. 48 at 14.] Even if this is true, however, it would not establish that Julian violated Chappell’s Eighth Amendment rights. Again, to violate the Eighth Amendment, a condition of confinement must be “so harsh as to shock the [] conscience,” *Bono*, 620 F.2d at 613, or result in an “unquestioned and serious deprivation of basic human needs,” *Rhodes*, 452 U.S. at 348. Trying to get Chappell to sign off on an administrative remedy and then speaking to him “hatefully” after he refused does not satisfy either of these criteria. Thus, because Chappell’s allegations against AHSA Julian are either too general or do not constitute a constitutional violation, Julian must be dismissed as a defendant.

Similarly, Chappell also mentions AHSA Booth, RN Worthington, and Dr. Lukens in Claim Eleven, but his allegations against them are also insufficient to state an Eighth Amendment violation. As to AHSA Booth, Chappell claims that, after receiving no medicine at the pill window for several days, on February 3, 2020, he told AHSA Booth that he was out of his medicine and had been for seven days and that she responded, “They fill them by need evidently you are not on that list, GO BACK TO SICK CALL.” [Filing No. 48 at 13.] But it is well established that merely complaining to a prison administrator, such as an Assistant Health Services Administrator, is not sufficient to hold that administrator personally liable under *Bivens*. *See, e.g., Iqbal*, 556 U.S. at 677 (rejecting the argument that a supervisor’s mere knowledge of his subordinate’s misconduct amounts to the supervisor violating the Constitution); *Estate of Miller v. Marberry*, 847 F.3d 425, 428 (7th Cir. 2017) (noting that “inaction following receipt of a complaint about someone else’s conduct is not a source of liability” under *Bivens*); *Vance v.*

Peters, 97 F.3d 987, 993 (7th Cir. 1996) (rejecting the proposition that any prisoner communication to a prison official anywhere in the corrections hierarchy constitutes adequate notice to the official of an Eighth Amendment violation). Accepting Chappell’s allegations as true, that is essentially what AHSA Booth did here—she directed him to go back to sick call, where he could bring his concerns to his providers. Because this is the *only* allegation against AHSA Booth in Chappell’s Complaint, Booth is also entitled to dismissal.

Regarding RN Worthington, in Claim Eleven, Chappell alleges only that he told Worthington on January 31, 2020, that he was out of his pills, and Worthington told Chappell to check the pill window. [See Filing No. 48 at 13.] There are no facts suggesting that Worthington was aware that Chappell’s medicine was not available at the pill window over the course of the following days. One mere mention to Worthington that his medicine was out is not enough to support a plausible inference that Worthington acted with a sufficiently culpable state of mind, one of criminal recklessness or total unconcern for Chappell’s welfare in the face of serious risks.¹⁰ See *Collins v. Seeman*, 462 F.3d 757, 762 (7th Cir. 2006) (“We have characterized the required showing as ‘something approaching a total unconcern for [the prisoner’s] welfare in the face of serious risks.’”); *Tesch v. County of Green Lake*, 157 F.3d 465, 475-76 (7th Cir. 1998) (stating that, to establish “deliberate indifference,” a plaintiff is required to prove that the prison official’s action was deliberate or reckless in the criminal sense).

Likewise, the only mention of Dr. Lukens in Claim Eleven is that he was present when AHSA Julian purportedly told him to sign off on his BP-8 and that “they were all just staring [him] down,” when he refused to sign. Neither Dr. Lukens’s presence nor him allegedly “staring

¹⁰ Chappell also mentions Worthington in Claim Four. [Filing No. 48 at 6.] Because, as argued in section D, the events in Claim Four concern discrete events that occurred outside the statute of limitation, Worthington should also be dismissed as a defendant.

[Chappell] down” shocks the conscience or amounts to a deprivation of a basic human need, as necessary to state an Eighth Amendment violation. *See Rhodes*, 452 U.S. at 348; *Bono*, 620 F.2d at 613. Nor does Chappell allege he suffered any harm from Dr. Lukens’s purported actions. *See Lord v. Beahm*, 952 F.3d 902, 905 (7th Cir. 2020) (noting that a plaintiff must not only establish that a government actor violated his constitutional rights, but also that the violation caused the plaintiff injury or damages). As such, Dr. Lukens should also be dismissed as a defendant.¹¹

Similarly, in Claim Thirteen, Chappell accuses Dr. Trueblood and Hart of denying him blood thinners for several days in September, October, and November of 2018. [Filing No. 48 at 17.] But, again, he does not allege that he suffered any physical injury from this specific denial. *Lord*, 952 F.3d at 905. Rather, he makes general allegations of primarily mental and emotional distress. [See Filing No. 48 at 17-18.] As such, Claim Thirteen should be dismissed as well, entitling Dr. Trueblood to dismissal.

Turning to Officer Sconce, Chappell mentions him only once, in Claim Six. [See *generally* Filing No. 48.] Specifically, Chappell contends that Officer Penman ordered Sconce to drive away from a medical center, denying him his cardiology appointment, and that, on March 23, 2018, Penman pointed a gun at him, threatened to shoot him, and then ordered Sconce to pull over, but Sconce kept going. [*Id.* at 8.] Accepting these allegations as true, they are insufficient to establish that Sconce violated Chappell’s Eighth Amendment rights. Indeed, it would appear

¹¹ Chappell also mentions Dr. Lukens in Claim Fourteen, which he sought to add in February. [See Filing No. 48-2.] Based on the Court’s order [Filing No. 47 at 3], it does not appear that this claim against Dr. Lukens was permitted to go forward. If it was, then this claim suffers from this same deficiency requiring dismissal—namely, the failure to allege that the denial of blood thinners caused Chappell any harm. The same is true for the identical allegations in this claim against Dr. Trueblood.

as if Sconce actually protected Chappell by refusing to pull over despite Penman's order to do so. Thus, Sconce should also be dismissed as a defendant.¹²

Chappell also accuses several defendants of threatening him in various ways, mostly verbally. [See Filing No. 48 at 2, 9, 17 (accusing Captain Hess of threatening to kill him, slap him, beat him, and put him in the SHU), 2, 10 (contending that Hiron threatened Chappell for killing Hubert Hess, saying that Chappell was "gonna get what [he] deserve[d]" and threatened to fire him for filing remedies), 10 (alleging that Wright threatened to fire him for filing remedies and tried to get inmates to jump him, beat him up, and run him off for trying to report everything), 10 (alleging that Atterbury and Snow said, "We've been to war. We kill people to [sic], what you gonna do huh?"), 17 (claiming that Hart told him, "your [sic] done filing . . . don't you know something bad is going to happen to you, we can go in your cell and find drugs or a weapon anytime"), 17 (contending that Royer took his glasses, ordered him into the hallway, and told him "you like writing letters now your gonna get your ass beat").] Although a threat *can* constitute cruel and unusual punishment, Chappell's allegations that some defendants threatened to fire him from his prison job, place him in the SHU, beat him (or have other inmates beat him), and other vague, veiled threats to potentially go into his cell and find a weapon, do not rise to this level. See *Dobbey v. Ill. Dep't of Corr.*, 574 F.3d 443, 445 (7th Cir. 2009). This is particularly true given that none of these threats to do (or cause) physical harm actually materialized. See *Henslee v. Lewis*, 153 F. App'x 178, 179 (4th Cir. 2005) (unpublished) (dismissing an inmate's claim that a jail employee incited other inmates to attack him when there was no contention any attack occurred because "[m]ere threats or verbal abuse by prison

¹² As set forth *supra*, these discrete claims against Officer Sconce also occurred outside the statute of limitations, further justifying Sconce's dismissal.

officials, without more, do not state a cognizable [Eighth Amendment] claim”); *Barney v. Pulsipher*, 143 F.3d 1299, 1311 n.11 (10th Cir. 1998) (concluding that severe verbal harassment and intimidation are not sufficient to state a claim under the Eighth Amendment and are only actionable “in combination” with assaults).

Moreover, as the Seventh Circuit noted, “harassment, while regrettable, is not what comes to mind when one thinks of ‘cruel and unusual’ punishment. Nor does it inflict injury comparable in gravity to failing to provide prisoner with adequate medical care or with reasonable protection against the violence of other prisoners.” *See Dobbey*, 574 F.3d at 446; *see also DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) (“Standing alone, simple verbal harassment does not constitute cruel and unusual punishment . . .”). Thus, most verbal harassment by correctional officers does not rise to the level of cruel and unusual punishment. *Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015); *Tate v. Harmon*, No. 7:19-cv-00609, 2020 WL 7212578, at *7 (W.D. Va. Dec. 7, 2020) (“[V]erbal harassment by correctional officers alone—while abhorrent and unprofessional—does not violate the Eighth Amendment.”), *appeal filed*. Because Chappell’s allegations against Wright, Atterbury, Snow, Hess, Hart, Royer, and Hirons do not allege any direct physical contact or any conduct that “shocks the conscience,” this is not one of those occasions in which mere threats or harassment sufficiently state an Eighth Amendment violation, subjecting these claims to dismissal. *See Bower v. Cannon*, No. 17-10905 (RBK) (JS), 2018 WL 6441034, at *4 (D.N.J. Dec. 5, 2018) (dismissing sexual harassment claims for failure to state a claim when the complaint failed to allege any direct physical contact between the plaintiff and defendant).

Chappell’s remaining claims against Warden Bell and Lt. Baker are primarily premised on their purported failure to act when Chappell reported Captain Hess’s (alleged) threats to them.

[*See* Filing No. 48 at 9.] If the threat is not cognizable, then a failure to act in response to the threat cannot constitute an Eighth Amendment violation either. In light of the deficiencies noted elsewhere regarding the other allegations against these two defendants, they are both entitled to dismissal.

Finally, to the extent that any of Chappell's Eighth Amendment claims are premised on defendants purportedly denying him administrative remedy forms or preventing him from filing remedies or contacting Congressmen [*see* Filing No. 48 at 8 (accusing Baker of throwing away his remedy and blocking him from filing and writing to Congressman Carson)], such actions, even if true, neither "shock the conscience" nor deprived Chappell of any basic human need. *See Rhodes*, 452 U.S. at 348; *Bono*, 620 F.2d at 613. Accordingly, those claims also fail to state a cognizable constitutional violation.

D. Several defendants should be dismissed based on the statute of limitations.

It is well-settled that Indiana's two-year statute of limitations applies to Chappell's *Bivens* claim against the defendants. *See* Ind. Code § 34-11-2-4; *King v. One Unknown Fed. Corr. Officer*, 201 F.3d 910, 913 (7th Cir. 2000); *see also Eison v. McCoy*, 146 F.3d 468, 470 (7th Cir. 1998); *Hoosier Bancorp of Ind., Inc. v. Rasmussen*, 90 F.3d 180, 182 (7th Cir. 1996). Thus, because Chappell first initiated this action on April 27, 2020, any allegations arising out of discrete events that occurred before April 27, 2018, are time barred.

The Court recognized as such in its Screening Order, noting that Chappell was relying on the "continuing harm" doctrine to save his claims. [*See* Filing No. 34 at 9-10.] At the same time, the Court properly dismissed the time-barred claims against defendants whom Chappell contended acted on a particular date in 2017 and had no ongoing involvement in his medical care. [*Id.* at 11.] Under this same reasoning, the statute of limitations bars all the claims against

Atterbury, Snow, Penman, Sconce, and Hirons, and the allegations in Claim Four against RN Worthington and PA Mata, providing yet another reason to dismiss these defendants.

Indeed, Chappell's allegations against Atterbury, Snow, Penman, Sconce, and Hirons all involve discrete events that occurred before April 27, 2018—the cut-off for his timely claims. [See Filing No. 48 at 2, 10 (alleging that, in May 2017, Hirons refused to transfer Chappell and threatened him), 8 (alleging that Penman ordered Sconce to drive away from the medical center,¹³ and that, on March 23, 2018, Penman pointed a gun at Chappell and ordered Sconce to pull over, but Sconce refused), 10 (alleging that on December 14, 2017, Atterbury and Snow pushed him, kicked his feet, and threatened him), 10 (alleging that Atterbury tried to get him to sign off on administrative remedies, which LeRoy Brown's affidavit [Filing No. 48-1 at 12] contends happened on April 20, 2018).] Accordingly, all of these defendants should be further dismissed on this basis.

Similarly, in Claim Four, Chappell accuses RN Worthington and PA Mata of deliberate indifference during a visit on September 27, 2017 [Filing No. 48-1 at 6], which is well before the two-year statute of limitations. Although Chappell mentions Worthington and Mata other times in his Complaint, as set forth above, those allegations are either too vague and general to satisfy Rule 8's pleading requirements or do not constitute deliberate indifference. As such, all of the claims against these defendants must be dismissed as well, entitling Worthington and Mata to dismissal.

Likewise, Claim Two of Chappell's Second Amended Complaint specifically complains about Counselor Hart's purported actions on September 24, 2017. [See Filing No. 48 at 4.] This

¹³ The administrative remedy that Chappell filed about this purported event establishes that it allegedly occurred on March 9, 2018, outside the statute of limitations. [See Filing No. 102-16 (Turner Decl. Att. 15) at 1-2.]

is also a discrete act that occurred outside the two-year statute of limitations. Accordingly, Claim Two should be dismissed as time barred as well.

IV. MOTION FOR SUMMARY JUDGMENT ON FAILURE TO EXHAUST

Should the Court deny the motion to dismiss, in full or part, all defendants move, in the alternative, for summary judgment on their failure to exhaust defense. As set forth below, although Chappell exhausted five remedy cases involving his allegations in Claims One through Five of his operative Complaint, those remedies all concern discrete events that occurred outside the statute of limitations. Accordingly, the remaining, timely claims in this action must be dismissed due to Chappell's failure to exhaust.

A. Standard on a Rule 56 motion.

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the court construes all justifiable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party who bears the burden of proof on a particular issue, however, may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994). “[T]he mere scintilla of evidence” and “[i]nferences supported only by speculation or conjecture” cannot defeat a motion for summary judgment. *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 894 (7th Cir. 2018) (citations omitted).

B. Chappell failed to exhaust any remaining, timely claims.

The PLRA requires inmates to fully exhaust their administrative remedies before bringing any suit involving prison conditions. *See* 42 U.S.C. § 1997e(a); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006); *Porter*, 534 U.S. 516; *Booth v. Churner*, 532 U.S. 731, 740-41 (2001); *Ford v. Johnson*, 362 F.3d 395, 398 (7th Cir. 2004). This statute makes exhaustion a condition precedent to suit in federal court. *Burrell v. Powers*, 431 F.3d 282, 284 (7th Cir. 2005). In *Booth*, 532 U.S. at 739, 741, the Supreme Court held that full exhaustion is mandatory, leaving the court with no discretion in this area, as “Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures.” There is no futility exception to the exhaustion requirement under the PLRA. *See, e.g., Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010).

Exhaustion should be addressed early in the litigation because the PLRA “gives prisons and their officials a valuable entitlement—the right *not* to face a decision on the merits—which courts must respect if a defendant chooses to invoke it.” *Perez v. Wis. Dep’t of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999). Accordingly, when a defendant asserts exhaustion, “the judge must address the subject immediately” because the PLRA “can function properly only if the judge resolves disputes about [exhaustion] before turning to any other issue in the suit.” *Id.*; *see also Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008) (“The alternative of trying the merits before exhaustion . . . is unsatisfactory . . . because it would thwart Congress’s effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies.”).

The Supreme Court has “identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does

occur by leading to the preparation of a useful record.” *Jones v. Bock*, 549 U.S. 199, 219 (2007); *see also Cannon v. Washington*, 418 F.3d 714, 719 (7th Cir. 2005) (stating that the exhaustion requirement is “designed to alert prison officials to perceived problems and to enable them to take corrective action without first incurring the hassle and expense of litigation”); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002) (noting that the exhaustion requirement “give[s] the prison administration an opportunity to fix the problem—or to reduce the damages and perhaps shed light on factual disputes that may arise in litigation even if the prison’s solution does not fully satisfy the prisoner”).

Furthermore, “the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter*, 534 U.S. at 532. To properly exhaust under the PLRA, an inmate must fully comply with the prison grievance procedures in effect at his place of confinement, *Jones*, 549 U.S. at 199, including filing “complaints and appeals in the place, and at the time, the prison’s administrative rules require,” *Pozo*, 286 F.3d at 1025.

The BOP has promulgated an administrative remedy system that appears at 28 C.F.R. § 542.10, *et seq.*, and BOP Program Statement 1330.18, Administrative Remedy Program (“P.S. 1330.18”). [Filing No. 102-1 (Turner Decl.) at ¶ 5.] The BOP administrative remedy process is a method by which an inmate may seek formal review of a complaint related to any aspect of his imprisonment. 28 C.F.R. § 542.10. To exhaust his remedies, an inmate must typically first file an informal remedy request through an appropriate institution staff member via a BP-8 prior to filing a formal administrative remedy request with the Warden. 28 C.F.R. § 542.13; P.S. 1330.18 at 4. Usually, if the inmate is not satisfied with the response to his informal remedy (BP-8), he is required to first address his complaint with the Warden via a BP-9. 28 C.F.R. §

542.14; P.S. 1330.18 at 4. If the inmate is dissatisfied with the Warden's response, he may appeal to the Regional Director via a BP-10. 28 C.F.R. § 542.15; P.S. 1330.18 at 6-7. Finally, if the inmate is dissatisfied with the Regional Director's response, then the inmate may appeal to the General Counsel via a BP-11. 28 C.F.R. § 542.15; P.S. 1330.18 at 7. An inmate who has filed administrative remedies at all required levels and who has received a response to his appeal from the General Counsel is deemed to have exhausted his administrative remedies as to the specific issue, or issues, properly raised therein. *See* 28 C.F.R. § 542.15 ("Appeal to the General Counsel is the final administrative appeal."). Following exhaustion at all three administrative levels, the inmate may file a civil action in the proper United States District Court with respect to the issues properly addressed and exhausted at the administrative level. 42 U.S.C. § 1997e(a).

Here, Chappell has exhausted only five remedy cases—921499, 921520, 924723, 926050, and 928471. [Filing No. 102-1 (Turner Decl.) at ¶ 11; *see generally* Filing No. 102-5 (Turner Decl. Attachment 4).] No. 921499 involves Chappell's allegations concerning the catheterization procedure by Dr. Orman on September 22, 2017 [Filing No. 102-6 (Turner Decl. Att. 5) at 1-5, 7, 9], and essentially align with the allegations Chappell makes in Claim One of his operative Complaint [*see* Filing No. 48 at 1-3]. Chappell's remedies in No. 921520 encompass his allegations in Claims Three and Four about the care he received from Dr. Orman and Nurse Bixler on September 25, 2017, and from PA Mata and RN Worthington between September 26th and 29th of 2017. [*Compare* Filing No. 48 at 5-6, *with* Filing No. 102-7 (Turner Decl. Att. 6).] No. 924723 complains about events that purportedly occurred on November 19, 2017, involving Nurses Norris and McGee and corresponds to Claim Five of the Complaint. [*Compare* Filing No. 48 at 7, *with* Filing No. 102-8 (Turner Decl. Att. 7).] The allegations in Claim Two regarding Counselor Hart's purported actions on September 24, 2017, are included in

No. 926050. [*Compare* Filing No. 48 at 4, *with* Filing No. 102-9 (Turner Decl. Att. 8).] In the remaining exhausted case (928471), Chappell complains that PA Mata did not renew his pain medications at the end of December 2017 in retaliation for filing on her. [Filing No. 102-10 (Turner Decl. Att. 9).] This, however, does not directly align with any specific allegations in Chappell’s operative Complaint. [*See generally* Filing No. 48].

In its Screening Order, however, the Court dismissed all of the defendants named in Claims One, Three, and Five [*see* Filing No. 34 at 11-12], effectively dismissing these claims. As to Claims Two and Four, which are encompassed in either Remedy Case No. 921520 or 926050, both of these claims concern discrete events that happened in September of 2017, well before the April 27, 2018, cut-off for timely claims. Accordingly, any claims related to Remedy Nos. 921520 and 926050 are barred by the statute of limitations.

More importantly, the central inquiry on the exhaustion issue is whether the remedy served to alert prison officials to the problem or conditions about which the inmate was complaining, thereby providing prison officials an opportunity to investigate and address the claims before litigation. *See Jones*, 549 U.S. at 219 (“[T]he primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that may be sued.”); *Wilder v. Sutton*, 310 F. App’x 10, 15 (7th Cir. 2009) (unpublished) (“[P]risoners must only put responsible persons on notice about the conditions about which they are complaining.”); *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002) (“When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.”); *Smith v. Zachary*, 255 F.3d 446, 450 (7th Cir. 2001) (“Requiring prompt notice and exhaustion also gives prison officials an opportunity to address a situation internally . . .”). Chappell’s exhausted remedies were focused on specific and discrete events that

happened between September and December of 2017 and would not have provided the BOP the opportunity to investigate allegations arising after April 27, 2018. This is particularly true given that BOP's Central Office responded to four of these remedies before April 27, 2018, and responded to the remaining remedy shortly thereafter, on May 11, 2018. [See Filing No. 102-5 (Turner Decl. Att. 4).]

In that same vein, courts have recognized that an inmate cannot rely on an administrative remedy to exhaust claims that arose after the remedy was filed. *See, e.g., Barnes v. Allred*, 482 F. App'x 308, 312 (10th Cir. 2012) (unpublished) ("A grievance 'cannot exhaust administrative remedies for claims based on events that have not yet occurred.'") (quoting *Ross v. County of Bernalillo*, 365 F.3d 1181, 1188 (10th Cir. 2004)); *Wolfel v. Collins*, No. 2:07-CV-1296, 2011 WL 14457, at *1 (S.D. Ohio Jan. 4, 2011) (finding that 2004 administrative remedy could not exhaust claim that arose in 2007); *Blackmon v. Crawford*, 305 F. Supp. 2d 1174, 1177 (D. Nev. 2004) (holding that an inmate had not exhausted his claim regarding Hepatitis C because he filed his grievances before the alleged mistreatment of his Hepatitis C began). Here, Chappell filed his BP-9s in his five exhausted remedy cases on November 14, 2017, December 13, 2017, December 28, 2017, and January 23, 2018. [E.g., Filing No. 102-1 (Turner Decl.) at ¶¶ 12-16.] Thus, Chappell cannot rely on these remedy cases as the means for exhausting any of his claims arising after he filed these BP-9s. Essentially, this means that any of his exhausted claims are time barred, and that any of his timely claims are unexhausted.

Notably (and contrary to his allegations that he was prevented from accessing the administrative remedy process), Chappell *did* file or submit approximately 63 remedies between September 2017, when his claims first arose, and April 27, 2020, when he initiated this action. [See Filing No. 102-1 (Turner Decl.) at ¶ 10; Filing No. 102-4 (Turner Decl. Att. 3) at 8-39.]

And many of those submissions relate to his allegations in this action.¹⁴ But, in all of these remedy cases, Chappell failed to comply with the administrative remedy procedure by filing timely, compliant remedies at each level, having those remedies accepted at each level, and obtaining a response from each level, up to and including the BOP's Central Office. [See, e.g., Filing No. 102-1 (Turner Decl.) at ¶¶ 17-19, 22-23, 25-26, 28-29, 33.] Accordingly, all of these remedy cases are unexhausted. As to any claims that Chappell was prevented from accessing the administrative remedy process, the plethora of claims he filed in the relevant period as well as his ability to successfully exhaust five of those remedy cases belies any such contention. See *Wagoner v. Lemmon*, 778 F.3d 586, 591 (7th Cir. 2015) (stating that the fact that the prisoner “was able to exhaust two of his claims offers a reason to reject his claim that he was prevented from exhausting his other six”).

Finally, because an inmate must exhaust any remedies *before*, and not during the course of, litigation, any remedies that Chappell may have submitted after he initiated this action in April of 2020 are irrelevant. See, e.g., *Jones*, 549 U.S. at 202 (stating that the PLRA “requires prisoners to exhaust prison grievance procedures before filing suit”); *Ford*, 362 F.3d at 398 (noting that “Section 1997e(a) says that exhaustion must precede litigation” and that “[no] action shall be brought until exhaustion has been *completed*” (emphasis added)); *Perez*, 182 F.3d at 535 (noting that the district court lacks “discretion to resolve a claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment”). And amending the Complaint does

¹⁴ See Filing No. 102-1 (Turner Decl.) at ¶¶ 18-19, 22-23, 25-26, 28-29, 33; Filing No. 102-11 (Turner Decl. Att. 10); Filing No. 102-12 (Turner Decl. Att. 11); Filing No. 102-15 (Turner Decl. Att. 14); Filing No. 102-16 (Turner Decl. Att. 15); Filing No. 102-18 (Turner Decl. Att. 17); Filing No. 102-19 (Turner Decl. Att. 20); Filing No. 102-22 (Turner Decl. Att. 21); Filing No. 102-24 (Turner Decl. Att. 23); Filing No. 102-25 (Turner Decl. Att. 24); Filing No. 102-31 (Turner Decl. Att. 30); Filing No. 102-32 (Turner Decl. Att. 31).

not cure this deficiency. *See Linton v. Randall*, No. 10-1208, 2011 WL 3678517, at *2 (C.D. Ill. Aug. 22, 2011); *Salado v. Grams*, No. 06-C-598-C, 2007 WL 5517481, at *1 (W.D. Wis. Apr. 6, 2007).

This is particularly significant as to Chappell's claims against Lt. Sherman and Officer Vest, which arose during his transfer on January 6, 2021, months *after* Chappell initiated this action on April 27, 2020. [See Filing No. 48-2 at 2-3.] As such, it would have been impossible for Chappell to exhaust claims regarding these events before he first brought this suit.

Ultimately, the only remedies that Chappell exhausted encompass claims that are outside the statute of limitations. Because Chappell failed to exhaust any of his timely claims, this entire action must be dismissed. *Jones*, 549 U.S. at 211 ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.").

V. CONCLUSION

For the foregoing reasons, Defendants, by counsel, respectfully request that the Court grant their motion to dismiss. In the alternative, respectfully request that this Court grant summary judgment in their favor and against Plaintiff Bryan Colby Chappell and grant all other just and proper relief.

Respectfully Submitted,

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Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2021, a copy of the foregoing *Brief in Support of Defendants' Motion to Dismiss for Failure to State a Claim or, in the Alternative, or Summary Judgment on Failure to Exhaust Defense* was filed electronically. Service of this filing was made on all ECF-registered counsel by operation of the Court's electronic filing system.

I further certify that on June 30, 2021, a copy of the foregoing *Brief in Support of Defendants' Motion to Dismiss for Failure to State a Claim or, in the Alternative, or Summary Judgment on Failure to Exhaust Defense* was mailed, by first class U.S. Mail, postage prepaid and properly addressed to the following:

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